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ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

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400 Seventh Street, S.W.
Washington, D.C. 20590

Qualification of Drivers; Exemption Applications; Vision
Notice of Petitions and Intent to Grant Applications for Exemption
65 Fed. Reg. 33406, May 23, 2000

Introduction

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Motor Carrier Safety Administration (FMCSA) notice of petitions and intent to grant applications for exemptions from the vision standard, Title 49 United States Code of Federal Regulations (C.F.R.) § 391.41(b)(10). 65 Fed. Reg. 33406 *et seq.* (May 23, 2000). Advocates does not comment on the merits of the individual applications or the specific qualifications of the 63 drivers except as necessary to exemplify problems in the quality and quantity of the information provided regarding the applications, the agency's presentation of the information to the public, and the process adopted by the agency for evaluating the petitions and for making determinations to grant the exemptions. The agency has reviewed the applications on the merits and has preliminarily determined that each exemption is likely to achieve a level of safety that is equal to, or greater than, the level of highway safety that currently exists without the exemptions.

Advocates files these comments for several purposes. We comment in order to clarify the consistency of the exemption application information provided by FMCSA to the public; to object to the agency's misplaced reliance on conclusions drawn from the vision waiver program; to underscore the procedural inadequacy of this notice and previous, similar notices; to address the agency's misinterpretation of existing law regarding the statutory standard governing exemption determinations; and, to place in the administrative record of this proceeding, the pertinent portions of a ruling of the U.S. Supreme Court that directly bears on the legal validity of vision exemptions and the agency's exemption policy.

The Federal Motor Carrier Safety Improvement Act of 1999

More than 5,000 people are killed annually in commercial motor vehicle (CMV or truck and bus) related crashes and recent data shows that the fatality total has been increasing in the last 5 years. In addition, many thousands of motor carriers are unrated by the FMCSA and timely information about operator records is poor. A number of crashes involving motor coaches in recent years, as well as the issuance of a proposed change in the driver hours-of-service regulations, has heightened awareness regarding motor carrier and operator safety. In addition, Congress expressed its concern for safety on our nation's highways and specifically determined that there is a need for new leadership and oversight in the regulation and stewardship of commercial motor vehicle operations. Toward that end, Congress passed and the President signed the Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, 113 Stat. 1748 (Dec. 9, 1999), which required the establishment of a new agency, the FMCSA, within the U.S. Department of Transportation. That agency was formally established as of January 1, 2000. 65 Fed. Reg. 220 (Jan 4, 2000).[1]

The Federal Motor Carrier Safety Improvement Act of 1999 (Safety Improvement Act), was enacted in order to significantly enhance the oversight and safety of commercial motor vehicles. The Safety Improvement Act established the FMCSA as an agency which is devoted to motor carrier safety. The premise of the Safety Improvement Act is that a new safety agency, with expanded resources and funding, dedicated to the safety of commercial motor vehicle operations, could achieve the safety improvements intended by Congress, as well as fulfill the 10-year fatality reduction goal set by the Secretary of Transportation.

The Safety Improvement Act changed the fundamental manner in which federal authorities regulate motor carriers. Congress identified in the findings section of the Safety Improvement Act a list of major problems with the existing federal oversight of commercial vehicles that needed to be corrected. In order to implement these statutory findings and purposes, Congress explicitly enshrined safety as the new agency's mission and highest priority. The Safety Improvement Act states that the FMCSA "shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation." Safety Improvement Act, Section 101(a). Not only is safety the agency's highest priority, it is the single most important goal which the agency is required to promote in all of its actions and functions. This is not merely gratuitous rhetoric, but represents a clear mandate to the FMCSA to advance safety as its paramount mission and to carry out actions and adopt policies which demonstrate the advancement of safety goals to the highest degree.

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[1] Authority to carry out motor carrier functions was re-delegated to the Administrator of the Federal Motor Carrier Safety Administration, including exemption authority provided under 49 U.S.C. §§ 31315 and 31136(e).

As a consequence of the unequivocal wording and clear meaning in the Act, the agency must justify each of its actions based on its measurable safety impact. FMCSA is authorized to improve safety not merely to a greater extent than existed before, but to promote the "highest degree of safety in motor carrier transportation." *Id.* This means that safety must be the rationale behind agency planning, analyses, and programs, and that the FMCSA must demonstrate that its goal is to achieve the highest possible level of safety in its decisions and actions. The enactment of the Safety Improvement Act sets an overarching standard to achieve the highest degree of safety in motor carrier operations, and the establishment of the FMCSA was intended to ensure that this pre-eminent standard of safety is achieved through agency policy choices and other actions.

Motor Carrier Driver Qualifications Exemption Policy

In light of these events and other concerns about safety, Advocates opposes the policy of granting exemptions from the federal motor carrier safety regulations including the driver qualification standards. Rather than granting exemptions, the agency should focus on scientific research that will establish whether current safety standards accurately measure the level of safety required to ensure safe motor carrier operations, and on research to develop a rational basis for conducting individualized testing. Granting exemptions based on surrogate criteria does not ensure that deviations from the motor carrier safety standards will provide equivalent or greater levels of safety. Moreover, piecemeal exemptions from otherwise credible and established standards will only serve to undermine the standard itself and increase the pressure to grant exemptions from other safety standards. Unfortunately, FMCSA, and its predecessor agencies, have participated in this devaluation of the existing federal motor carrier safety standards (FMCSRs) by accepting "junk" science and non-scientific analysis as a valid substitute for the vision safety standard, and by placing the burden on the public to oppose granting these and other exemptions.

Exemption Determinations Made Prior to Public Notice and Comment

Advocates objects to FMCSA's issuance of this notice requesting comments only subsequent to the agency having already made "preliminary" determinations to grant the exemptions. According to the notice, the FMCSA has already "evaluated each of the 63 exemption requests *on its merits* . . . and determined that exempting these 63 applicants from the vision requirement [ ] is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption." 65 Fed. Reg. 33407 (emphasis supplied). Thus, prior to providing public notice and an opportunity for public comment to inform and affect the agency's decision, the FMCSA has already made its determination on the merits based entirely on the application and the agency's screening process. As a result, the

request for public comment is not truly not a fair and unbiased attempt to solicit comment and views on the application for these exemptions. Rather, like an interim final rule in which the agency has already made its decision, the agency has predetermined its view of the merits prior to soliciting and evaluating public comment on the petitions. Although the agency may claim that the determination is only an initial one, the very act of making a determination to grant the exemption transforms the issue from one of objective evaluation to that of a decision the agency must defend or change. This procedure places an undue burden on the public which is faced with overcoming the agency's premature determination. Making the safety determination prior to requesting public comment effectively raises the level of proof needed to show that granting an exemption is not safe.

An indication that the agency's preliminary determinations, for all practical purposes constitutes the final determination as well, is the fact that not one of the applications that the agency has preliminarily determined should be granted has ever been denied. Only those applicants who do not meet the initial screening criteria have been denied an exemption, and this decision is made without public notice or comment. No applicant who meets the screening criteria, however, has been denied an exemption for any reason, including because of information subsequently received from the public.[2]

Furthermore, it is evident from the factual presentations in past exemption notices that, by the time the preliminary determination is made, the agency has indeed determined the final outcome on the merits without the benefit of public comment. The agency has regularly placed itself in the role of advocate, rather than objective decisionmaker, in explaining accidents and citations that appear on the three-year driving record of some petitioners.

Advocates recommends that the FMCSA alter its procedure and adopt a process that is more objective and in line with the requirements specified in 49 U.S.C. § 31315, as well as the dictates of the Administrative Procedures Act, 5 U.S.C. § 553. The statutory language governing treatment of exemption applications states that:

> *[u]pon receipt* of an exemption request, the Secretary [FMCSA] shall publish in the Federal Register a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request.

49 U.S.C. § 31315(4)(A) (emphasis supplied). This language permits the agency to conduct a safety analysis, process the applications to ascertain which supply complete information and,

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[2] In one instance, the agency has delayed action on a pending petition based on information received from the State of Iowa. *See* 64 Fed. Reg. 16517 (April 5, 1999). In more than a year since that announcement the agency has yet to act on the information received, and has not denied the petition.

screen the applications to assess which comply with the agency's published exemption criteria. The statutory language does not permit or imply, however, that a determination or even a "preliminary" determination on the merits is to be made by the Secretary or the FMCSA prior to obtaining public comment.[3] The statutory section that immediately follows, which governs the granting of requests for waivers, exemptions, and pilot programs, clearly indicates that the granting of such a request is subsequent to the publication of notice and opportunity for public comment. *Id.* 31315(4)(B). Thus, as a matter of statutory construction, as well as procedural due process, the FMCSA should not undertake to make "preliminary" determinations of requests for waivers, exemptions, and pilot programs prior to notifying the public of the details of the request and soliciting and evaluating the public comment.

The FMCSA's predecessor agency, the Office of Motor Carrier Safety (OMCS), argued that a preliminary determination is "analogous to a notice of proposed rulemaking." 64 Fed. Reg. 66964. *See also* Notice of Final Disposition, 64 Fed. Reg. 51568, 51572 (Sept. 23, 1999). This characterization is inaccurate and not applicable to exemption petitions. The determination made as part of the exemption petition process is quasi-judicial, not at all akin to informal rulemaking. The agency is not given the leeway to conduct research and investigate issues as is usually required in order to issue a proposed rule. Rather, the statute requires that exemption petitions must be published "upon receipt" and before any determination on the merits has been made. No agency intervention in terms of deciding the issues as is appropriate for a proposed rule were contemplated by Congress in the area of exemption requests. The appropriate procedural approach is for FMCSA to publish exemption petitions in the *Federal Register* and to request public comment without making a prior determination on the merits.[4]

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[3] Indeed, the words "[u]pon receipt" imply that publication of a notice in the *Federal Register*, accompanied by the mandated opportunity for public comment, should occur promptly after receipt of the exemption application and does not allow for a review of the request on the merits.

[4] Another modal administration within the Department of Transportation provides a shining example of how this procedure can be conducted in a proper and fair manner. The National Highway Traffic Safety Administration (NHTSA) frequently receives petitions requesting exemption, pursuant to 49 U.S.C. § 30118(d), from the requirements for notification and remedy of defects and noncompliance under 49 U.S.C. §§ 30118 & 30120. NHTSA invariably publishes the application for a decision of inconsequential noncompliance and requests public comment without making an initial or preliminary determination of the merits of the application. In one representative example of an application for a decision of inconsequential noncompliance, NHTSA stated that "[t]his notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 *and does not represent any agency decision or other exercise of judgment concerning the merits of the application.*" 64 Fed. Reg. 27032 col. 2 (May 18, 1999) (emphasis supplied). This typifies NHTSA's treatment of the plethora of exemption applications handled by the agency annually, and provides a fair , unbiased means of making determinations on the merits of each application after notice and an opportunity for public comment.

The clear meaning of the statute is that all petitions for exemptions are published along with any safety analysis[5] and factual information submitted by the requestor or known to the Secretary. Only after the facts are made known to the public and the public has an opportunity to comment, does the agency make the determination as to whether the petition should be granted or denied. That is why the statute has three separate subdivisions governing how the agency is to proceed. The first requires publication "[u]pon receipt," the second addresses the subsequent granting of a request, and the third requests that are denied. 49 U.S.C. (B)(4) subsections (A) through (C). Thus, OMCS was entirely incorrect in stating that "[i]t is only when the agency proposes to grant a petition that it publishes the proposal." 64 Fed. Reg. 51572. The FMCSA should not adopt the practice or arguments previously used by OMCS. Nothing in the statute indicates that the agency, on behalf of the Secretary, is to delay publication of the petition so that the agency has time to determine whether to grant the petition and to fashion factual arguments in support of the petitioner's request and the agency's preliminary determination.

Advocates is aware that the FMCSA must process petitions for exemptions to ensure that the petition is complete in terms of the factual information and supporting documents that applicants must provide. In addition, we understand that the agency must perform a further screening of the petitions to confirm that the petitioner meets the basic criteria required by the agency of candidates for vision exemptions. Both of these administrative processes are initially performed by an outside contractor hired by the FMCSA.

In light of these administrative necessities, and in order to streamline the process, the FMCSA should publish a petition for exemption upon receipt, after first ascertaining only whether the petition provides the essential factual information and documentation required for the agency to process the request for an exemption. The agency could also screen the petition request based on the agency's criteria in order to ensure that only those candidates that actually meet the substantive safety criteria established by the agency for vision exemptions are subject to further review. Since the processing and the screening are conducted by the outside contractor, no safety determination need be made by the agency until public comment has been received and evaluated, and the record is complete. In this way, there is a separation between the ministerial functions performed by the contractor to identify eligible candidates based on their applications, and the substantive safety determination that must be made by the FMCSA Administrator based on a full and complete record including public comment.

The public is entitled to know whether the agency intends to grant or deny an exemption application, but the agency should only make that determination on the merits after

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[5] Neither the FMCSA, nor its predecessor agencies, have conducted any safety analysis with regard to the petitions for exemption from the vision standard. Even if such an analysis were made, it would not necessitate the rendering of a determination prior to the receipt and evaluation of public comment.

public comment has been solicited and received. This allows the agency to address concerns raised in the public comment with an open mind. The agency personnel in charge of determining whether to grant or deny requests for waivers, exemptions, and pilot programs should not pre-determine the outcome before evaluating public comment on the request. The process urged on the agency by Advocates would only require that the agency follow applicable statutory procedures in publishing and reviewing exemption applications. The agency must abide by the legal requirements for fundamental fairness and due process by refraining from making any judgment on the merits of an exemption petition until after the public has been afforded the required notice and opportunity for comment.

Consistency of Information Presented to the Public

Advocates has reviewed the accompanying background information as to each of the drivers as reported by FMCSA. While the factual information presented on behalf of each applicant is sparse, and no safety analysis is supplied, the FMCSA has at least responded to criticism leveled by Advocates in prior exemption notices by providing a more organized and consistent presentation of some of the driver background information in this notice.[6] The more important issue, however, is the dearth of information and analysis on which the FMCSA presumes to make (and has already made) determinations to grant these exemptions. The information provided in the notice amounts only to a terse statement of a few highlights on behalf of each applicant without providing any analysis or closer scrutiny. Essentially, the information only reflects that each applicant has passed the screening stage for exemption criteria and meets, at least on its face, the preconditions for consideration of the exemption application. The FMCSA presents these bits of information as if they constituted a safety analysis of the driver record, but no actual analysis is presented.

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[6] In this notice the FMCSA has made an effort to provide the eyesight for both eyes, the years of driving experience and the number of years driving commercial motor vehicles for each applicant. This is an improvement over past notices. The agency also consistently reported on the applicant driving record for the previous three years while driving commercial motor vehicles only. While the driving record information is more consistent than past notices the public is entitled to know the driving record of the applicants in non-commercial motor vehicles as well. Accidents and violations in private passenger and other non-commercial vehicles are considered by licensing agencies, insurers, and the public as indicative of good driving performance and should be considered by FMCSA and made available to the public. Although crashes in commercial motor vehicles is the criterion used by the agency for granting exemptions, the public still has the right to know if the applicants have on their records crashes in other vehicles during the last three years and the circumstances surrounding those accidents. In another vision exemption notice, where the petitioner had not driven a CMV for the last 5 years, the FMCSA sought to rely on the applicant's driving record in his passenger vehicle. *See* 65 Fed. Reg. 20254, 20256-57 (April 14, 2000). The agency cannot arbitrarily select the situations in which it chooses to rely on passenger vehicle records and only make those records known to the public when it serves the purpose of supporting a petitioner's application.

For each applicant, the FMCSA notice states the total miles they have driven (either annually or over their lifetimes), the number of years driving commercial vehicles, the type of vehicle, and the most recent three-year driving record. The public, however, is not advised whether the information presented is taken from the driver applications without outside verification, or whether the FMCSA has determined these figures are accurate by other means. For example, miles driven is reported for each driver either as an annual figure or as a total for the driver's lifetime. No insight is provided as to how these figures were derived nor is any statement made about their reliability. If the driver mileage figures are self-reported, the FMCSA should inform the public as to how the totals were arrived at, and what documentation was submitted by each driver to verify the accuracy of the figures cited in the notice. If the total mileage is based on other sources, the FMCSA should describe the type and quality of information on which the mileage figures are based. A similar concern exists about the verification of the other information presented to the public as the basis for granting the exemption The FMCSA should disclose how it verified the information that formed the basis for its determinations.

In addition, no effort is made to scrutinize the information provided beyond total figures. For instance, there is no analysis of the percentage of total miles driven daytime versus nighttime by each applicant. Moreover, while crash and violation records are given only for the three years immediately preceding the date of the application, miles driven by each applicant is generally stated as a total figure over the driver's entire driving career, or as a single annual figure that, presumably, is presented as an average to be multiplied by the years of driving over the applicant's career. As a result, no reliable exposure data for the three years covered by the official driving record is available unless the applicants actually drove an equal number of miles each year, an unlikely scenario. The FMCSA needs to provide an accurate mileage figure for the three years during which the driving record is applicable. This exposure factor would be helpful in determining the mileage compiled by each applicant in the most recent driving years, as opposed to earlier in their driving careers, and whether individual applicants with crashes and violations on their records have accumulated those based on relatively low exposure (few miles driven each year) or high exposure (many miles driven each year) in the three years immediately preceding their application for exemption.

For example, the notice indicates that petitioner number 38 has driven a total of 33,600 miles over a six year driving career. This means that over the last three years, on average, that applicant has driven only 5,600 each year whereas applicant number 37, who reportedly has driven 3.1 million miles over 34 years, has riven an average of more than 90,000 miles annually. This raises two questions. First, does each driver's annual average driving mileage over the career accurately reflect the driving mileage accumulated during the last three years. Since no figure is provided for the last three years, the public is provided no option but to use an average mileage figure even though it may not be accurate. Second, assuming that the average annual driving mileage figure is an appropriate measure, what does the agency

consider to be a comparatively low mileage total, over the past three years, in assessing a driver's qualifications. Obviously, it is a far more meaningful to state that applicant number 37 had no accidents and no citations while driving over 270,000 miles in the last three years than it is to state that applicant number 38 had no accidents and no citations while driving only 16,800 miles over the last three years. Not only should FMCSA attempt to ascertain mileage driven for the last three years, the pertinent period for which the agency checks state driving records, but the agency should also determine whether future safety records can be predicted based on applicant's with extremely low cumulative mileage over that three year period.

The FMCSA clearly believes that the number of miles driven by an applicant is an important factor in determining to grant the application for his exemption and has reported the mileage driven all applicants. If, however, mileage driven is one of the critical criteria used by the agency to make its determination then not only should the mileage driven be indicated for all applicants, but the agency should require applicants to meet a minimum average annual mileage or total mileage in order to qualify for an exemption. We note in this regard that the mileage driven by the applicants varies widely, from as little as 33,600 total miles over six years of driving for applicant number 38, to a reported 5.5 million miles for applicant number 40 with 50 years of reported driving experience.[7] Moreover, although FMCSA has provided some separate information on applicant experience and mileage driving combination tractor-trailers and straight trucks, the agency has not assessed the relative value in terms of driving experience between driving these two types of vehicle configurations.

The FMCSA also provides the number of years of driving experience for each applicant. Clearly, since there are so few facts provided in the agency notice to support each application, the number of years of CMV operation is considered a significant piece of information. However, the public is not advised as to how this fact, the years of driving experience (as well as the overall mileage), is ascertained or verified. Presumably it is based on information supplied by the applicants. Since the agency verifies only the last three years of each applicant's driving history against official state driving records, it is unlikely that the agency verifies the total number of years of driving experience reported by the applicants. More important, the juxtaposition of reporting a large total number of years of driving experience (10, 20 and 30 years or more), as well as a large total of miles driven, along with a verified driving history of only three years, creates the possibly misleading impression that the applicant has a long safe driving history. The implication is that prior to the last three years each applicant had a safe driving record with no accidents, citations, or convictions. The presentation of the driving history information in this manner, although not intended, gives

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[7] The FMCSA notice indicates that one driver, applicant number 11, reported driving 4 million miles over an eight year period. We understand that this information is a mistake and the applicant actually reported driving 500,000 miles over an eight year period. This raises the issue, however, of the accuracy of the information reported by FMCSA to the public. Since only scant information is presented to the public in the blurbs on behalf of each applicant, it is essential that the agency supply accurate, verified factual information.

favorable treatment to those applicants who may have been involved in accidents and received citations more than three years before their application.

An example of this was presented in that last FMCSA notice regarding vision exemptions for drivers. 65 Fed. Reg. 20245 (April 14, 2000). In the case of one exemption applicant, the FMCSA preliminarily determined that his application would meet the safety standard in the exemption statute based on the applicant's last three years of driving in which he had no accidents and no citations. The agency reported that the applicant had

> driven straight trucks for 48 years and 3.6 million miles and tractor-trailer combinations for 18 years and over 3.3 million miles. He holds a California [commercial drivers' license] CDL and has no accidents or convictions of moving violations in a [commercial motor vehicle] CMV on his driving record for the past 3 years.

Id. at 20250 (petitioner number 54). This information, juxtaposed with the verified clean driving record for the three years immediately prior to the application gave the public the distinct impression that the applicant had a long, safe driving history. However, the Department of Motor Vehicles (DMV) for the State of California filed comments advising the FMCSA that in 1995 and 1996, the two years prior to the last three-years on which the FMCSA basis its safety determination, the applicant had been involved in two accidents and received a citation for driving on the wrong side of the road. Comment from California DMV filed with docket FMCSA-2000-7006. Since the incidents reported by the California DMV preceded the three-year state record rule applied by the agency for screening exemption petitions, the agency was either unaware of the applicant's involvement in those unsafe events or, if the agency was aware of those incidents, it chose not to consider them in making its preliminary safety determination because those events preceded the last three-year period.

This situation raises serious concerns regarding the factual record on which the FMCSA relies in making its determinations to grant vision exemptions, and the agency's approach to unverified driving histories and state driving records. First, the FMCSA should avail itself of state collected driving information including state records older than three-years. So long as driving records are verified as accurate by the state they are relevant and material to the safety determination. In reviewing exemption petitions, the agency should avail itself of all information that is germane to the driving record and safety of the applicants. The FMCSA should request driving histories over extended time intervals from states that retain driving records for more than three years, even if that requires states to search additional databases and archived files. Second, the agency should not publish as fact self-reported information about driving records without authenticating accident and citation information. The agency should consider reporting only driving experience and mileage history for which the agency has obtained a state driving record or which can be verified. Advocates believes that the FMCSA

should make every effort to assure the public that exemptions are only granted to those drivers with a verified safe driving history of at least five to ten years, not just the last three years.

Further, the FMCSA has not made any attempt to distinguish between the kinds of driving routine the applicants experienced based on the type of driving they have done. In its recently issued proposed rule on driver rest and sleep for safe operations, 65 Fed. Reg. 25540 *et seq.* (May 2, 2000), the agency distinguishes between five types of drivers and driving regimes: long haul; regional; local-split shift; local; and work vehicle. In terms of hours-of-service requirements the agency has identified distinctions that indicate that drivers involved in different types of routines and schedules have different experiences. In this notice, the agency has not indicated whether such different types of driving experience are relevant factors for consideration, whether the different types of driving should be given equal weight and treatment within the context of the exemptions considered in this notice, and what types of driving each applicant is most familiar with. While some breakdown between tractor-trailer combination and straight truck is mentioned, there is no analysis of the driving environment, local streets or rural interstates, that have made up the majority of each applicant's driving experience. The agency simply presents all reported driving experience as equally acceptable even though neither the vision waiver program information nor research data supports the conclusion that driving a straight truck is equivalent to operating a tractor-trailer combination. Indeed, there is a good deal of research to distinguish the two which has not been addressed by the agency. This disparity raises an issue as to the qualifications of some applicants, especially if the agency is using the drivers in the vision waiver program as the basis for this judgment. While Advocates does not believe that data obtained from the now-defunct vision waiver program can be used for this or any other purpose (an issue addressed in greater detail below), it does appear that the drivers in that program had far more driving miles than some of the applicants considered for exemptions in this notice, and that those miles were driven on long-haul trips in tractor-trailer combinations, not short-haul, day-trips exclusively in straight trucks.

The FMCSA continues to emphasize, as it should, that most exemption applicants do not have an accident or citation (however, only in a commercial vehicle) in the prior three years. In this notice the agency reports that six of the 63 applicants have either accidents or citations on their driving records within the last three years. The agency does make an attempt in one instance to defend the individual applicant by describing the crash circumstances in terms that minimize the culpability of the applicant. The agency should refrain from engaging in such defenses unless it is prepared to provide the full factual record of the incident. It is inappropriate for FMCSA to proffer the applicant's version of events, to provide selective information from documents not in the public record, and to bolster the application in this manner especially when the underlying information and documents are not available to the

public and not part of the public record. The docket does not contain any basis for the information presented regarding the accidents in which applicants 41 and 42 were involved.[8]

Advocates continues its objection with regard to the FMCSA's reliance on personal statements from ophthalmologists or optometrists as to the applicant's ability to safely operate a commercial motor vehicle. While these specialists may be able to provide information regarding visual acuity and other aspects of visual capacity of the applicant, they are not experts on the driving task and are most probably unfamiliar with the requirements for safe operation of commercial motor vehicles. This is particularly true in light of the fact that the vision standard requires better vision than any of the applicants possess. Moreover, none of these statements indicate that the ophthalmologists or optometrists are familiar with the types of vehicles that are driven by the applicants or the conditions under which their patients actually operate a commercial vehicle including annual driving mileage, amount of time spent loading vehicles and waiting for loads, amount of nighttime driving performed, weather conditions, over-the-road sleeping conditions (cab berths, motels), etc. None of these specific conditions are taken into account in the statements that are provided to the public. Moreover, the ophthalmologists or optometrists conducting the exams may have no prior familiarity with the patient. While such professionals can attest to a patient's level of visual acuity, they cannot be relied on for the proposition that the applicant has sufficient vision to perform the task of operating a commercial motor vehicle. The agency, however, uses the statements of the ophthalmologists and optometrists not just to establish the degree of the applicant's visual acuity, but as testimonials to support the view that the applicant is a safe driver. While the doctors are experts on vision, they are not experts on driving ability and conditions and so their opinions on those issues are not persuasive, should not be relied on by the agency, and should not be quoted and recited as fact in the agency's public notice.

In light of the concerns presented about the quality of the information on which the agency has made its "preliminary" determinations to grant the exemptions, as well as the fact that not all the information relied on by the agency has been made available to the public, the FMCSA should place in the docket for public review a copy of each application and all other documents on which the agency relies in making its preliminary determination. The public should not be limited to filtered bits of self-reported information but should have access to the

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[8] It does appear that the FMCSA has tempered past efforts to defend the accident records of exemption applicants through the selective recitation of facts gleaned from court and police documents that are not in the public docket. In prior notices, the agency repeatedly provided specific information to exculpate, or at least ameliorate, the liability of exemption applicants who had been involved in crashes or cited for traffic violations. In past notices, it was obvious that the agency was engaging in the selective rendition of information to support the exemption petitions which the agency had preliminarily determined to grant. In this and the prior exemption notice, the FMCSA has not engaged in this practice to the extent evident in previous vision exemption notices. However, the agency's continued reliance on facts and information that are not part of the record constitutes a violation of procedural due process, and is at odds with fundamental rules of informal rulemaking.

petitions and the underlying supporting documents. Personal information, including addresses and other personal identifiers could be redacted before being made available to the public. In addition, Advocates requests that the agency provide the agency's safety analysis, if any, of the application and information provided in the petitions for exemption.

Misplaced Reliance on the Vision Waiver Program

The FMCSA's Notice of Petitions and Intent to Grant Applications for Exemption, in concluding that the 63 applicant' petitions for exemptions should be granted, relies in part on the purported results obtained from the ill conceived and illegal vision waiver program. According to the agency, "[t]he 63 applicants have qualifications similar to those possessed by the drivers in the waiver program." 65 Fed. Reg. 33413. The agency asserts that "[w]e believe that we can properly apply the principle to monocular drivers because the data from the vision waiver program clearly demonstrate the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively." *Id.* Advocates disagrees with this use of information collected from the now-defunct vision waiver program. The agency concludes "*that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.*" *Id.* (emphasis added). No such conclusion, however, is tenable since the vision waiver program did not use a valid research model nor did it produce results that could legitimately be applied to any drivers other than those participating in the original vision waiver program.

Indeed, FMCSA was strongly criticized by a number of independent researchers and research organizations for ignoring basic principles of scientific methodology in its conduct of the vision waiver program. In the wake of the federal court decision that invalidated the vision waiver program, *Advocates for Highway and Auto Safety v. Federal Highway Administration*, 28 F. 3d 1288 (D.C. Cir. 1994), the agency admitted the inadequacy of the study methodology and design. "The FHWA [now FMCSA] recognizes that there were weaknesses in the waiver study design and believes that the waiver study has not produced, by itself, sufficient evidence upon which to develop new vision and diabetes standards." 61 Fed. Reg. 13338, 13340 (Mar. 26, 1996).[9] In fact, the information collected in the vision waiver program is worthless as scientific data, and conclusions regarding the safety of any other individual driver or group of drivers who did not participate in the vision waiver program are neither credible nor scientifically valid. The agency cannot extrapolate from the experience of drivers in the vision waiver program to other vision impaired drivers who did not participate in that program. This point was made repeatedly to the FHWA in comments to the numerous dockets spawned by the

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[9] *See also Qualification of Drivers; Vision Deficiencies; Waivers -- Notice of Final Determination and change in research plan*, 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994) ("The agency believes that the observations made by the Advocates, the ATA, the IIHS and others regarding flaws in the current research method have merit").

agency's determination to grant vision waivers. It was made quite clear at the time the agency undertook to grant waivers to drivers in the vision waiver program that the individualized information accumulated in that program could not be used to serve any other purpose. Information collected in that program has been comprehensively repudiated as a basis for drawing any conclusions about non-participant drivers. The FMCSA, therefore, is obligated to re-evaluate the merits, and reconsider its preliminary determination to grant exemption petitions without any reliance on, or reference to, the experience of the drivers who participated in the vision waiver program.

Interpretation of Statutory Standard for Granting Exemptions

In previous notices of final disposition of exemption requests, OMCS granted all the exemption requests that had been granted preliminarily (with one exception referenced in footnote 6, page 7, *supra*). In doing so, OMCS asserted that it was afforded more flexibility to grant exemptions under current law than it had under prior law. *64 Fed. Reg. 66964; see also* 64 Fed. Reg. 27025 (May 18, 1999); 63 Fed. Reg. 67600 (Dec. 8, 1998).[10] The FMCSA appears to have adopted this same line of argument.[11] Advocates disagrees with the agency's view on this issue and its interpretation of the controlling law.

The current law on exemptions permits granting an exemption if that exemption "would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." 49 U.S.C. § 31315(b)(1). The FMCSA, as OMCS and FHWA before it, believes that Congress "changed the statutory standard to give the agency greater discretion to consider exemptions." 64 Fed. Reg. 27025 (1999). Indeed, the agency interprets the term "equivalent" to allow for a "more equitable resolution of such matters." *Id. See also* Federal Motor Carrier Safety Regulations; Technical Amendments, final rule, 65 Fed. Reg. 25285 (May 1, 2000). There is no basis in fact or law for this view.

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[10] *See* comments filed by Advocates for Highway and Auto Safety to DOT Docket Nos FHWA-99-5473 (filed June 17, 1999), and FHWA-98-4145 (filed Feb. 8, 1999), respectively.

[11] For example, the FMCSA recently stated that "[a]ccording to the legislative history, the Congress changed the statutory standard to I've the agency greater discretion to consider exemptions. The previous standard was judicially construed as requiring an advance determination that absolutely no reduction in safety would result from an exemption. The Congress revised the standard to require that an 'equivalent' level of safety be achieved by the exemption, which would allow for more equitable resolution of such matters, while ensuring safety standards are maintained." Federal Motor Carrier Safety Regulations; Technical Amendments, final rule, 65 Fed. Reg. 25285 (May 1, 2000). As we show in this section of the comments, the agency's conclusion is spurious and at odds with the express meaning of the statutory language.

The level of safety required in order for the Secretary of Transportation to grant waivers and exemptions is governed by the statutory language contained in section 4007 of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107 (1998) (codified at 49 U.S.C. § 31315). The statute requires that the Secretary, prior to issuing waivers and exemptions, determine whether granting a waiver or exemption "is likely to achieve a level of safety *that is equivalent to or greater than*, the level of safety that would have been achieved" absent the waiver or exemption. 49 U.S.C. § 31315 (a) & (b)(1) (emphasis added).[12] By its express terms, the law requires the Secretary, based on evidence in the record, to find that any waiver or exemption will not reduce safety, but will achieve a safety result that is equal to or greater than the level of safety that would have been experienced had the waiver or exemption not been granted.

This statutory language of equivalent or greater safety sets a very high standard that is no less stringent than the previous statutory standard which required that waivers be consistent with safety. *See* 49 U.S.C. § 31136(e) (1997). The standard of safety in section 31515 (a) & (b) is not a lower or more flexible standard than the prior legislative mandate that waivers must be "consistent with . . . the safe operation of commercial motor vehicles."[13] The express wording of section 31315 requires a degree or level of safety that is at least equal to the degree or level of safety that existed prior to the granting of the waiver or exemption, *i.e.*, no reduction in safety is countenanced. Any attempt to gloss the standard of safety established in section 31315 as a less demanding safety standard than the prior waiver standard is a misinterpretation of the unambiguously clear statutory language.

The FMCSA appears to endorse the position of OMCS that under the TEA-21 wording exemptions are to be considered "slightly more lenient than the previous law." 64 Fed. Reg. 66964. OMCS relied on arguments previously made by FHWA which, in turn, cited legislative history addressing section 31315 to assert that "Congress changed the statutory standard to give the agency greater discretion to consider exemptions." 64 Fed. Reg. 27025. According to the agency's reasoning, requiring that an "'equivalent' level of safety be achieved by the exemption, [ ] would allow for more equitable resolution of such matters, while ensuring safety standards are maintained." *Id., citing* H.R. Conf. Rep. No. 105-550, 105th Cong., 2d Sess. 489 (1998). This legislative history asserts that "[t]o deal with the [court's] decision, this section substitutes the term "equivalent" to describe a reasonable expectation that safety will not be compromised." *Id.* Neither these statements by FHWA, nor the cited

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[12] In order to grant a waiver the Secretary must also find that it is in the public interest. 49 U.S.C. § 31315(a).

[13] Indeed, the language of the prior waiver provision, that a waiver must be "consistent with the public interest and the safe operation of commercial motor vehicles," (49 U.S.C. § 31136(e) (1997)), provides a less strict safety standard than the current statutory terminology.

legislative history, support the interpretation that section 31315 reflects a lower or more flexible standard of safety.

The plain meaning of the statutory language is unambiguous. The statutory standard, that an "exemption would likely *achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver*," requires no elucidation. 31315(b)(1) (emphasis added). The term 'equivalent' indicates a condition which is "equal in force, amount, or value" and is "corresponding or virtually identical esp. in effect or function."[14] Nothing whatever in the use of the word 'equivalent' in section 31315, as a substitute for the expression 'consistent with' used in the prior statutory provision, connotes or implies any increased flexibility, diminution, or other abridgement of the enacted safety standard for granting and administering waivers and exemptions. OMCS' contention that lowering the standard for granting waivers (exemptions) was "unquestionably the intention of Congress in drafting section 4007," 64 Fed. Reg. 66964, is a contention that is in conflict with the express language and wording of the statute. Where Congress has addressed the issue in clear and unambiguous terms that ends the inquiry. *See Chevron U.S.A., Inc., v. N.R.D.C.*, 467 U.S. 837 (1984).

Even if the standard set forth in section 31315 were not clear and unambiguous, reliance on the legislative history in this instance is unavailing. First, the statute makes no reference to providing a more flexible safety standard than had existed in the past. While "legislative history may give meaning to ambiguous statutory provisions, courts have no authority to *enforce* alleged principles gleaned *solely* from legislative history that has no statutory reference point." *International Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO, v. N.L.R.B.*, 814 F.2d 697, 699 (D.C. Cir. 1987) (emphasis in original). Second, the cited legislative history relied on by in the past by OMCS and FHWA is taken from the Senate amendment to the original House bill, but was not restated in the Conference substitute adopted with enactment of TEA-21. As such, it is both a matter of pragmatic fact and legal precedent that this statement of one committee in one house of Congress, which was not adopted by the Conference Committee, is not the applicable legislative history accompanying the law.[15] *See* H.R. Conf. Rep. 105-550 at 490-91. Indeed, the Conference legislative history makes no mention of granting greater discretion to the Secretary to grant

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[14] *See* Webster's New Collegiate Dictionary (1971).

[15] It is evident from an examination of the wording of section 31315, when compared with the Senate amendment, that the Senate report language is inapplicable. The scope of the Senate amendment did not extend to exemption applications by individuals, but was "limited to a class of persons, vehicles or circumstances." H.R. Conf. Rep. 105-550 at 490. The statute as enacted, however, allows for exemptions to be granted to "a person or a class of persons." 49 U.S.C. § 31315(b)(1). The Senate amendment was never intended to apply to individual petitioners. Since Congress did not adopt the Senate amendment, it cannot have adopted, through silence, an interpretation contained in a legislative report that accompanied an amendment which was never enacted into law.

waivers and exemptions nor does it reflect any intent to overturn a judicial decision. Therefore, the legislative history relied on by the agency is not authoritative. Moreover, to the extent that the legislative history openly conflicts with and contradicts the will and purpose of Congress as clearly expressed in the statute, the legislative history carries no legal weight or analytic value at all. Finally, according to the legislative history relied on by the FMCSA's predecessor agencies for their reasoning, the term 'equivalent' was selected by Congress for exactly the contrary purpose espoused by the agency, *viz.*, to provide "a reasonable expectation *that safety will not be compromised.*" H.R. Conf. Rep. 105-550 at 489 (emphasis added).[16] Thus, reliance on the appropriate conference report language actually bolsters the clear and unambiguous meaning of the statute that no decrease in safety is contemplated.

Supreme Court Decision on Vision Waivers

In *Albertsons, Inc. v. Kirkingburg*, No. 98-591 (June 23, 1999), the U.S. Supreme Court specifically rejected vision waivers[17] as a regulatory modification of the vision standard in the Federal Motor Carrier Safety Regulations (FMCSRs). "[W]e think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard. . . ." *Albertsons, slip op.* at 15. The Court refuted the view that "the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule [vision standard] had been modified by some different safety standard made applicable by grant of a waiver." *Id.* The Court reached this opinion based on the FHWA's own assertion that it had no facts on which to base a revised visual acuity standard either before *or after* the vision waiver program. "The FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety." *Id.* at 19. According to the Court, "there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter." *Id.*

In making these statements and reaching its conclusion, the Supreme Court relied heavily on the administrative record compiled and the decision of the Court of Appeals rendered in *Advocates for Highway Safety v. FHWA,* 28 F.3d 1288 (CADC 1994). The Supreme Court summed up the agency's basis for the Vision Waiver Program as follows:

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16 In fact, the rigorous controls of section 31315 are a paradigm shift in the level of procedural adequacy required to be observed by FMCSA in reviewing the legitimacy of and for awarding waivers and exemptions.

17 The Court was adjudicating the issuance of a waiver pursuant to 49 U.S.C. § 31136(e), which has since been transmuted into exemptions under 49 U.S.C. § 31315.

> the regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program *was simply an experiment with safety,* however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards.

Albertsons, slip op. at 20 (emphasis added) (citation omitted).

Indeed, although the *Advocates* case was not before it, the Supreme Court went out of its way to endorse the decision reached by the Court of Appeals, noting that is was "hardly surprising that . . . the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. See *Advocates for Highway Safety v. FHWA,* 28 F.3d 1288, 1289 (CADC 1994)." *Id.,* at note 21. The Court went on to emphasize that the agency has tried to have things both ways.

> It has said publicly, based on reviews of the data collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. [Citations omitted]. It has also noted that its medical panel has recommended 'leaving the visual acuity standard unchanged,' see 64 Fed. Reg. 16518 (1999) [citations omitted], a recommendation which the FHWA has concluded supports its 'view that the present standard is reasonable and necessary as a general standard to ensure highway safety.' 64 Fed. Reg. 16518 (1999).

Id.

The Supreme Court concluded that employers do not have the burden of defending their reliance on existing safety standards in the FMCSRs in the face of FHWA waivers. According to the Court, were it otherwise,

> [t]he employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government merely had begun an experiment to provide data to consider changing the underlying specifications.

Id. at 22.

It is clear from the Supreme Court's opinion that whatever validity the Vision Waiver Program may have had (and Advocates does not concede that it ever had any scientific

validity), was based on the premise of collecting empirical data in order to revise the visual acuity standard. This was the announced purpose of the program and the basis for data collection methodology. The Vision Waiver Program was not conceived or designed to serve any other legitimate scientific purpose. Since the program was subsequently discontinued by court order, and since the agency has acknowledged that the data collected is not sufficient to revise the existing standard, there is no appropriate use to which the data can properly be applied. Advocates does not accept, and neither FHWA nor OMCS has proven, that data collected about drivers who voluntarily participated in the Vision Waiver Program can be used as the basis for granting exemptions (waivers) to drivers who did not participate in that program. There is no credible basis for making such an extrapolation, particularly when the FMCSA claims it is making individual assessments of each applicant. The Supreme Court's discussion in *Albertsons* supports Advocates' view that the agency cannot fairly and credibly rely on data collected in the discredited Vision Waiver Program. The Supreme Court was eloquent in its conclusion that vision waivers are not a credible substitute for the underlying standard. Since the data collected in the program cannot be used for its intended purpose to revising the vision standard, it cannot and should not be used for any other legal, regulatory, or policy purpose including to justify the issuance of exemptions from the vision standard.

In previous notices regarding the Vision Waiver Program and vision exemptions, FHWA persistently invoked the Americans with Disabilities Act (ADA) as the rationale for the Vision Waiver Program and the subsequent issuance of vision waivers, now referred to as exemptions. During the Vision Waiver Program litigation in federal court, and even after the Court of Appeals nullified that program, the FHWA steadfastly maintained that the issuance of vision waivers was required in order to comply with the ADA. Advocates has long contended that the ADA does not override existing safety standards contained in the FMCSRs, and that the issuance of waivers is not a viable means of addressing requirements in the vision standard and other medical and physical qualifications for commercial drivers that are purported to be overly stringent. We were gratified to read that OMCS admitted that the ADA "does not apply to the Federal regulations." 64 Fed. Reg. 66965; *see also* 64 Fed. Reg. 66965. Thus, the OMCS at least, agreed that the vision waiver program and other programs of its kind, including waivers and exemptions, are not statutorily required by the ADA. This admission should lead the agency to reevaluate its position under the lower court decision in *Rauenhorst v. U.S. DOT, FHWA,* 95 F. 3d 715 (1996). That decision, which predates the U.S. Supreme Court opinion in *Albertsons,* was predicated on the assumption that the ADA applied to federal safety and medical qualification standards. Since the OMCS admitted that this is not the case, and in light of the Supreme Court decision more narrowly interpreting the ADA, the FMCSA should reassess its policy of grant numerous exemptions to the vision standard.

While it may be technically correct that the decision in *Albertsons* does not *"directly* affect the exemption program," 64 Fed. Reg. 66965 (emphasis added), it is very clear that from a factual standpoint the Court disdained the agency's granting waivers in such an

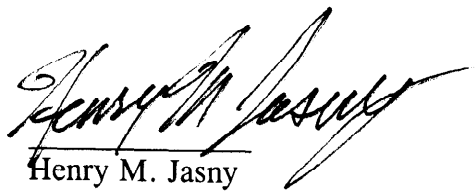
arbitrary and capricious manner. Clearly, the Supreme Court did not place much credence in the waivers issued by FHWA since it determined that employers subject to the federal requirements were free to ignore the waivers and did not have to hire drivers who held waivers. The common sense impact of the Court's decision is equally applicable to exemptions issued by the FMCSA. Advocates has always maintained that the appropriate procedure is to revise the standards based on relevant and sufficient medical and safety information. In *Albertsons,* the Supreme Court unanimously agreed with this position.

In reaching its decision, the Supreme Court discussed the legislative history of the ADA. As Advocates previously contended, the Court concluded that "[w]hen Congress, enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law." *Albertsons, slip op.* at 18. The Court cited the understanding of Congress that " 'a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of the legislation.' S. Rep. No. 101-116, pp. 27-28 (1998) [sic]." *Id.* The relevant Congressional committees did request that the Secretary of Transportation conduct a thorough review of knowledge about disabilities and make required changes within 2 years of enactment of the ADA. While FHWA and OMC failed to conduct such a review of the FMCSRs and medical qualifications in general, a subsequent review of the vision standard by FHWA found no empirical evidence on which to base any change in that standard. Thus, the waiver program did not fulfill the Congressional request to make necessary changes to the standards following a review because "the regulations establishing the vision waiver program did not modify the general visual acuity standards." *Albertsons, slip op.* at 18. It cannot be contended that Congress, in enacting the ADA, sought to undermine existing safety standards on an *ad hoc* basis by permitting the employment of persons who do not meet the extant safety requirements mandated by the Department of Transportation. As a result, the Supreme Court concluded that it

> is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms.

Id. at 22.

In light of the decision in *Albertsons,* the FMCSA should revisit the position previously taken by both FHWA and OMCS, re-evaluate the significance of the lower court decision in *Rauenhorst,* and reconsider the agency's policy of issuing experimental vision exemptions based on surrogate, non-visual criteria.



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